No. 483

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHARLES E. BOINEAU, JR., *et al.*, *Appellants*

v.

O. FRANK THORNTON, Secretary of State of South Carolina, *et al.*, *Appellees*

On Appeal From The United States District Court For The Eastern District of South Carolina

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the final order of the United States District Court for the Eastern District of South Carolina, entered on August 10, 1964, denying Appellants' motion for summary judgment and dismissing their complaint, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Eastern District of South Carolina, Columbia Division, is not yet reported. The order and the opinion of the Court are set forth in Appendix A hereto.

JURISDICTION

This action was brought under 28 U.S.C. § 1343(3) and (4), 42 U.S.C. § 1983 and 42 U.S.C. § 1988 for a temporary and permanent injunction against enforcement of § 23-357, South Carolina Code, by reason of unconstitutionality under the First, Fourteenth and Nineteenth Amendments to the Constitution of the United States. The judgment of the District Court was entered on August 10, 1964, and notice of appeal was filed in that court on August 13, 1964. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Baker* v. *Carr*, 369 U.S. 186; *Gray* v. *Sanders*, 372 U.S. 368; *Wesberry* v. *Sanders*, 376 U.S. 1; *Reynolds* v. *Sims*, 377 U.S. 533; *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633; *Davis* v. *Mann*, 377 U.S. 678; *Roman* v. *Sincock*, 377 U.S. 695; *Lucas* v. *Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether petitioners are denied equal protection of the laws under the Fourteenth Amendment by the enforcement of § 23-357, South Carolina Code, requiring that votes not be counted if a voter votes for more or less persons than the number of

offices to be filled, because the words "or less" of that section have no reasonable relation to the purpose of the statute: determination of voter intent in counting ballots?

2. Whether petitioners are denied the constitutional right to have their votes counted as cast by the provisions of § 23-357 because their votes will not be counted in the November General Election unless they cast ten votes for the State House of Representatives?

3. Whether petitioners are denied liberty of political choice because they are coerced by § 23-357 to vote for persons against their will in order to have any votes counted; and are denied equality of political choice because burdens are placed upon them that are not placed upon voters of the dominant political party?

4. Whether petitioners are denied equal protection of the laws because § 23-357 by its necessary force and effect dilutes and debases the weight and effect of their votes?

5. Whether petitioner-candidates are deprived of due process of law and equal protection of the laws in that § 23-357 deprives them of the right to be candidates upon an equal basis with other duly qualified candidates?

6. Whether petitioners are denied by § 23-357 the right to organize politically and to make effective use of political organization in political competition, violating the First and Fourteenth Amendments?

7. Whether petitioner Ellis is denied by § 23-357 the right to vote or to choose to vote on the basis of sex in violation of the Nineteenth Amendment?

8. Whether the District Court erred in dismissing petitioners' complaint for want of equity?

STATUTES INVOLVED

Section 23-357, Code of South Carolina, 1962, the constitutionality of which is challenged by Appellants, provides:

> "Ballot improperly marked.—If a voter marks more or less names than there are persons to be elected or nominated to an office or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office; but this shall not vitiate the ballot, so far as properly marked. Nothing herein shall be construed to prevent any voter in a general or special election from voting for any qualified person, other than those whose name are printed on the ballot, by writing in the name of the person opposite the office."

Other constitutional provisions and statutes involved are the First, Fourteenth and Nineteenth Amendments to the Constitution of the United States, 42 U.S.C. § 1983 and 42 U.S.C. § 1988, which are set forth in pertinent part in Appendix B hereto.

STATEMENT

Appellants are United States citizens, qualified voters of South Carolina, and of Richland County where they reside. Appellants Boineau and Turbeville are additionally the only two qualified candidates of the Republican Party for the State House of Representatives from that County, competing against a full Democratic Party slate of ten candidates. Ten seats are allotted to Richland County. Appellees are members of the State Board of Canvassers, the County Board of Canvassers, managers of elections in two voting precincts and the County custodian of voting machines.

Appellees are charged by Title 23, South Carolina Code, with the enforcement of § 23-357 of that Code, and with various duties involving enforcement and application of § 23-357, as set forth at length in Appellants' complaint and admitted in Appellees' answer. § 23-357 does not set qualifications for voters.

Appellees by their answer admit that the words "or less" of § 23-357 are construed and applied to require that, where more than one office of the same class is to be filled, as for a County delegation to the State House of Representatives, voters must vote for as many candidates for the class of offices to be filled as there are vacancies to be filled, under penalty of having no votes for that class of offices counted.

Appellants on June 27, 1964, filed complaint for preliminary and permanent injunction with the United States District Court for the Eastern District of South Carolina, alleging the unconstitutionality of § 23-357, South Carolina Code, under the First, Fourteenth and Nineteenth Amendments. A three-judge District Court was convoked. Appellants moved for summary judgment on July 20, 1964. The cause was heard on July 30, 1964, and on August 10, 1964, the District Court filed its opinion and order, denying summary judgment and dismissing the complaint for want of equity.

The District Court found that, although the enforcement of § 23-357 as so construed may in practice result in some dilution in the weight of Appellants' votes and votes cast for them and such dilution can be minimized only at the cost of some additional burdens upon Appellants and others similarly situated, § 23-357 is not in these respects arbitrarily unfair and discriminatory.

since the Legislature's purpose was the avoidance of dilution of votes and the achievement of full participation of the electorate in ultimate decisions. The complaint was dismissed for want of equity.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal affect directly the voting rights of some 386,000 voters in South Carolina, and inferentially those of some 560,000 voters in Alabama, some 638,000 voters in Louisiana, and some 1,368,000 voters in North Carolina, because the latter three states have statutes similar in effect to that being challenged. 1961 *Acts of Alabama*, Vol. II, Act No. 154, § 2; 1950 *Louisiana Revised Statutes* § 18-351; *General Statutes of North Carolina* § 163-175(6) (1964). These issues are of importance not only to these 2,952,000 voters but are of almost equal import to every voter of the nation, since the policy of § 23-357, South Carolina Code, furnishes a device for rendering minorities increasingly impotent whether a minority of occupation, race, or political party by diluting the effectiveness of minority votes in terms of those of the dominant majority. Moreover, fundamental and novel questions are raised as to compulsory voting and liberty of political choice, equality of political choice as among voters, the right of candidates to equality of opportunity to compete for election, the right to make effective use of political organization, and the rights of voters under the Nineteenth Amendment.

1. Certain issues involved are essentially applications of the principles laid down in *Reynolds* v. *Sims*, 377 U.S. 533, and the fundamental views of the nature of political rights guaranteed to citizens of the United States by the First and Fourteenth Amendments upon which the principles embodied in *Reynolds* are based.

The Supreme Court in *Reynolds*, as in *United States v. Bathgate*, 246 U.S. 220, held that the right to vote is individual and personal. The denial of equal protection of the laws found to exist in *Reynolds* is not limited, therefore, to denial of substantially equal weight and effect of votes cast in different places, but is likewise existent in denial of substantially equal weight and effect of votes as between different individuals in the same place. Under § 23-357 of the South Carolina Code, Appellants and others similarly situated are subjected to the dilution of the weight and effectiveness of their votes in comparison to votes cast for candidates of the opposing party. Appellants and others similarly situated are required by the statute to vote for eight other persons, in order that their votes will be counted for the two persons for whom they freely choose to vote. Their votes are accordingly of substantially less weight than those cast for candidates of the opposing party, being of approximately one-fifth the weight of such other persons' votes. This result was not avoidable by Appellants, since they and indeed no individual voter can control the number of nominees presented by a party.

2. A more fundamental defect of the statute is its abrogation of what the Court has in *Reynolds* referred to as "the right to exercise the franchise in a free and unimpaired manner." *Reynolds* v. *Sims*, 377 U.S. 533, 561-562. This right, protected by the First and Fourteenth Amendments, is denied by the compulsory voting required by § 23-357. Appellants are by the statute deprived of their liberty to vote only for persons of their choice, to vote against other persons, or not to vote, according to their personal desires. The District Court found that compulsory voting is within the

constitutional powers of the State and hence a legitimate purpose of the statute. Thereby, a completely novel constitutional issue is raised, although it appears that the Supreme Court proceeded upon a theory of liberty of electoral choice in *Reynolds*. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U.S. 533, 559.

3. If, as Appellants contend, compulsory voting is not a constitutionally permissible purpose, and if, as the Court has made clear, denial of racial or other minority rights to vote is not a constitutionally permissible purpose, the remaining legitimate purpose which § 23-357 can have is to authorize that votes not be counted where it is impossible to ascertain the intent of the voter. The words "or less" of § 23-357 have no reasonable relation, indeed no relation, to this purpose. A class of voters, including Appellants, is discriminated against without a reasonable basis by § 23-357.

4. The alternative permitted by the statute to Appellants acceding to the compulsion to vote is equally a deprivation of Fourteenth Amendment rights, namely that votes cast fewer in number than there are candidates to be elected are not counted. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote and to have their votes counted. *Ex parte Yarbrough*, 110 U.S. 651; *United States* v. *Mosley*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299.

5. A further effect of § 23-357 is to deny to Appellants, and indeed to anyone not an adherent of the dominant political party, equality in the exercise of

their political choice. Voters who wish to vote for candidates other than those of the dominant party (or in a primary election, for candidates other than those of the dominant faction of a party) have additional burdens imposed on them that are not imposed on voters who wish to vote for candidates of the dominant party. These additional burdens include inability to vote and have votes counted by activating the "straight ticket" lever, the necessity of writing in votes to avoid having their votes invalidated, and that instructions about the technique of writing in must be sought, imperiling the secrecy of the vote.

6. Appellants Boineau and Turbeville are deprived of the right to compete for election upon an equal basis with their opponents. The effect of § 23-357 is to require that Appellant-candidates, or any independent candidate, in an election where more than one candidate is to be elected, receive a greater percentage of the votes cast to be assured of election than the candidates belonging to a full slate. The discriminatory effect of § 23-357 in this respect is no less invidious because it is possible for a minority party to nominate a full slate of candidates. Parties are not required by South Carolina law so to nominate, and it is questionable whether such a requirement could constitutionally stand under the First and Fourteenth Amendments. Rather, the necessary discrimination of § 23-357 is demonstrated by its application to independent candidates, it being impossible for an independent candidate to list himself more than once to constitute himself a full ticket.

7. Inevitably, the enforcement of § 23-357 results in discouragement of minority political party organization by discouraging candidacies, and by burdening

voters. Thereby § 23-357 denies to Appellants the right of political organization and association guaranteed by the First and Fourteenth Amendments. *Cf. National Association for the Advancement of Colored People* v. *Alabama*, 357 U.S. 449.

8. It would not be seriously contended that the application of § 23-357 to deprive Negroes of the right to vote for Negro candidates would be permissible under the Fifteenth Amendment. Accordingly, the application of § 23-357 to deprive persons of either sex of voting for candidates of that sex is impermissible under the Nineteenth Amendment. Appellant Ellis contends, not that the Nineteenth Amendment guarantees a right to have women candidates on the ballot, but that the Nineteenth Amendment is violated by a statute, which as construed and applied, denies to women the right to vote only for women candidates.

It is submitted that no inequality of voting weight would result from the invalidation of the words "or less" of § 23-357. On the contrary, under the statute without these words, each voter regardless of race, place, occupation, sex, or party, would have substantially equal voting rights. Each voter would have, in the circumstances of Richland County, an equal right to cast from one to ten votes. Liberty of political choice would be restored, in that each voter could choose freely how his vote or votes would be distributed and for whom. The "individual and personal right of franchise" would thereby be vindicated. Appellants' action for the vindication of this individual and personal right that each vote of qualified voters be given as much weight as any other vote should not have

been dismissed by the District Court for "want of equity." *Wesberry* v. *Sanders*, 376 U.S. 1.

Respectfully submitted,

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APPENDIX A

Filed Aug. 10, 1964

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. AC-1465

CHARLES E. BOINEAU, JR., WILLIAM L. TURBEVILLE and DOLORES R. ELLIS, *Petitioners*

v.

O. FRANK THORNTON, Secretary of State of the State of South Carolina; E. C. RHODES, Comptroller General of the State of South Carolina; DANIEL R. McLEOD, Attorney General of the State of South Carolina; JEFF B. BATES, State Treasurer of the State of South Carolina; FRANK D. PINCKNEY, Adjutant General of the State of South Carolina; A. T. SMYTHE, JR., Chairman, Committee on Privileges and Elections of the House of Representatives of the State of South Carolina, comprising the Board of State Canvassers of the State of South Carolina and *ex officio* the State Board of Voting Machine Commissioners of the State of South Carolina; and

JESSE T. REESE, FRED H. RIDDLE and THOMAS D. SLIGH, comprising the Commissioners of Election and Board of County Canvassers for Richland County, State of South Carolina; and

ELLA F. CLOWNEY, RHODA N. FREEMAN, CAROLYN C. MIMS, MARY M. FULMER, CLARA W. MIMS and ROMELLE SMITH, comprising the Managers of Election, Columbia Ward 16, Richland County, State of South Carolina; and

RUBY DAVIS, PEARL TURNER, LILA TURNER, DOROTHY K. STERLING, NANNIE R. SWENK and LOUISE S. MACFIE, comprising the Managers of Election, Satchelford precinct; Richland County, State of South Carolina; and

LEX WATSON, Custodian of Voting Machines, Richland County, State of South Carolina, *Respondents.*

Order

Upon consideration of the briefs and the argument of counsel, it appearing to the Court for the reasons set forth in its opinion filed herewith that the plaintiffs, as a matter of law, are entitled to no relief,

IT IS, THEREFORE, ORDERED that the plaintiffs' motion for summary judgment be, and it hereby is, denied, and that their complaint be, and it hereby is, dismissed for failure to state a claim upon which relief may be granted.

s/ CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

s/ J. ROBT. MARTIN, JR.
United States District Judge

s/ ROBERT W. HEMPHILL
United States District Judge

A True Copy, Attest,

THOS. A. CAUTHEN
Clerk of U.S. District Court
East. Dist. So. Carolina

August , 1964

Filed Aug. 10, 1964

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

Civil Action No. AC-1465

[Title Omitted]

Argued July 30, 1964. Decided August 10, 1964.

Before Clement F. Haynsworth, Jr., United States Circuit Judge and J. Robert Martin, Jr. and Robert W. Hemphill, United States District Judges.

Ralph E. Becker, Hoover C. Blanton and Robert E. Goostree, representing the Petitioners;

Daniel R. McLeod, Attorney General of South Carolina, Everett N. Brandon, Assistant Attorney General of South Carolina, Clarence T. Goolsby, Jr., Assistant Attorney General of South Carolina, and Frank A. Graham, Jr., Richland County, South Carolina, County Attorney, representing the Respondents.

HAYNSWORTH, Circuit Judge:

Out of the now established principle that, within reasonable limits, each voter, in every state and its political subdivisions, is entitled to one vote as equal as may be in weight to that of every other voter in the same election, arises a question as to whether a state may constitutionally require a voter to vote for as many people as the number to be elected to, or nominated for, a particular office. The question arises in connection with the impending general election in Richland County, South Carolina, of ten members to serve in the South Carolina House of Representatives, and out of South Carolina's requirement that, in that election, each voter must vote for ten persons, no less and no more. We find the requirement not unconstitutional.

In a primary election, the Democratic Party of Richland County has selected ten nominees for election to the House of Representatives. The Republican Party, in a convention, has selected two nominees for the same office. Because the Republican Party does not have a full slate of nominees, the plaintiffs complain that Republican votes will be diluted by the requirement that, in order to cast a valid vote for the two Republican nominees, a voter must vote for eight of the Democratic nominees or eight other qualified electors. This contention is founded upon the Fourteenth Amendment, which has been held to prevent the dilution of votes by arbitrary attribution of greater weight to other votes.

There is another aspect of the complaint, for one of the plaintiffs, a lady, asserts a right under the Nineteenth Amendment to vote only for women candidates and to withhold her vote from all male candidates. She also supports the Fourteenth Amendment contentions of the other plaintiffs, for, if the voter is entitled under the Fourteenth amendment to vote for fewer condidates than the number to be elected, she assuredly has the right to make her selection upon the basis of their sex.

Because the plaintiffs seek to enjoin state officials from the performance of their duties upon the ground that the statute under which they will act is in conflict with the Constitution of the United States, a special District Court of three judges was convened pursuant to the provisions of 28 USCA §§ 2281 and 2284.

By statute in South Carolina,[1] it is provided that "[i]f a voter marks more or less names than there are persons to be elected or nominated to an office or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office . . ." Enforcement of the "or less" requirement of this statute is the object of the plaintiffs' attack.

[1] South Carolina Code, 1962, § 23-357.

The statute speaks in terms of a paper ballot to be marked by the voter. That was the customary method of voting in South Carolina in 1950 when the statute was enacted. All polling places in Richland County, South Carolina are now equipped with voting machines, however, and paper ballots are no longer in use. Agreeably with the purpose of the statute, however, the defendants, unless restrained, will cause the machines to be so set that the machine will not record a vote for any candidate for the House of Representatives unless the voter votes for ten, the number to be elected.

Under the statute, the voting machines will be so set that a Richland County voter wishing to vote a straight Democratic ticket in the election for the House of Representatives can move one lever, so that when the actuating lever is moved his vote is cast one each for the ten Democratic candidates. If he does not wish to do that, he may vote for one or both of the Republican nominees and nine or eight other persons, as the case may be, one or more of whom may be Democratic nominees. If he wishes, he may vote for ten persons, no one of whom has been nominated by either party, and the mechanics of writing in the names of persons other than the nominees of the two parties is not complicated. However, he must vote for ten. The actuating lever will remain locked, and no vote in the election for the House of Representatives can be recorded, until the voter has moved the one lever to vote for the ten Democratic candidates or ten levers to vote for ten persons, official candidates or others.

The plaintiffs would like the right to vote for the two Republican nominees by moving one lever and thus to vote a straight Republican ticket, though in itself incomplete, just as a voter may, if he wishes, vote a straight Democratic ticket, which is in itself complete. They want other voters wishing to vote for the Republican nominees to have the same right, and have produced mathematical data indicating that a requirement that Republican voters

vote for Democratic candidates to fill out a slate of ten would result in a dilution of the weight of the votes for the Republican nominees.

It is true, of course, that if every voter wishing to vote for the two Republican nominees were required to vote for eight Democratic nominees, the weight of the Republican votes would be substantially diluted, because Republican voters would be casting votes for Democratic nominees running against the Republicans. Such dilution would be at its maximum if the Republican votes for Democratic candidates were evenly distributed among the ten Democratic candidates. The dilution would be diminished if the voters who vote for the two Republican nominees should not divide their votes for Democratic nominees evenly among the ten Democratic candidates. The two Republican nominees will win if they receive more votes than the lowest two of the Democratic nominees. Thus if every voter who votes for the Republican nominees should vote for the same eight Democratic nominees, the Republican nominees would be elected by a bare majority of the voters. In that unlikely event, no dilution whatever of the weight of Republican votes would have occurred.

The law, however, does not require that any supporter of the Republican nominees vote for Democratic candidates. He may vote for the two Republicans and eight other persons of his choice. If he does so, his vote for the Republicans will not be diluted by any additional credit to any Democrat.

Moreover, the requirement that each voter vote for ten persons for the House of Representatives places the Republican nominees in a position to be the likely beneficiaries of the votes of normally Democratic voters who do not wish to vote for one or more of the Democratic candidates. Indeed, the plaintiff's assumption of straight party preference is not borne out by history in South Carolina. In the last election for the House of Representatives, the Richland County Republicans offered a complete slate of ten candi-

dates as did the Democrats. The disparity of votes among the twenty candidates shows a substantial amount of cross-voting. Recent history in South Carolina indicates that many voters vote for individuals without strict regard for party labels.

To avoid dilution of Republican votes, the device of write-ins for persons other than official nominees of either party is not wholly impractical. South Carolina voters are not unaccustomed to write-in voting. In the general election of 1954, the Honorable Strom Thurmond won election to the United States Senate as a write-in candidate.

Nevertheless, the South Carolina statute in its present form does impose some burden upon the present two Republican nominees and their supporters. It is a difficulty that could have been avoided if the Republican Party had nominated a full slate of candidates. Dilution of Republican votes can still be avoided by the use of the write-in device. The use of that device, however, places some additional burden upon the Republican voter, for it is not as easy to vote that way as for the straight Democratic ticket which can be accomplished by moving one lever. It is also probably true, as the plaintiffs contend, that the write-in device for avoidance of dilution of Republican votes could be made generally effective only if the Republican party and its nominees conduct a pre-election campaign to inform Republican voters about the means of voting without dilution of their vote for the two Republican candidates. In practice, therefore, enforcement of the statute may result in some dilution in the weight of the Republican votes as compared with the votes of straight ticket Democrats. Such dilution can be avoided or minimized, but only at the cost of some detriment to the Republican candidates and their supporters.

Given the fact that the Republican party chose to nominate an incomplete slate of candidates for the House of Representatives, however, a finding that the statute imposes

some detriment upon the two nominees and their supporters is only the beginning of our inquiry. We must look to the statute and the apparent legislative purpose to determine whether its enforcement is so arbitrary as to amount to a denial of equal protection of the law within the meaning of the Fourteenth Amendment. Before doing so, however, we should note the emergent principles from the recent voting cases in the United States Supreme Court.

In Baker v. Carr, 369 U.S. 165, the Supreme Court held that an action based upon the Fourteenth Amendment challenging gross malapportionment in a state legislature presented a justiciable issue. In Gray v. Sanders, 372 U.S. 368, the Supreme Court struck down Georgia's county unit system, and in Wesberry v. Sanders, 376 U.S. 1, the principle was enunciated that congressional districting must be done on a basis of substantial equality of population. Finally, late in the last term of the Supreme Court, a number of decisions came down involving apportionment and districting problems, of which Reynolds v. Sims, U.S. , (decided June 15, 1964) is the most pertinent here. In Reynolds v. Sims, it was decided that both Houses of Alabama's Legisla ure must be apportioned on the basis of substantial equality of population, and that geographic and other considerations were not constitutionally permissible standards.

In all of these cases, the dilution of voting power, which moved the Supreme Court to act, was both inherent in the situation and unavoidable. The voters in the under-represented districts or counties were powerless to increase their representation or to decrease that of overly represented districts or counties. Political remedies were obviously inadequate in such cases as Baker v. Carr and Reynolds v. Sims, for there had been no reapportionment of the two state legislatures involved in those cases for more than sixty years despite radical changes in population patterns.

These cases have now established the principle that districting must be substantially on a population basis in order to avoid disparities in the weight of votes in different voting districts. The opinions in Reynolds v. Sims make it plain, however, that while historical, economic and geographical considerations cannot be employed to justify disparity, "[m]athematical exactness, or precision is hardly a workable constitutional requirement." So long as the state apportions the houses of its legislature and draws the lines of its voting districts with full regard for the principle of equality of population, some divergence from the strict population basis is authorized, provided it is based upon practical and legitimate considerations which are more than excuses for disparity.

The teaching of these cases then, as we read them, is that population is the only permissible standard for districting, but state districting will not be struck down because of minor departures from the principle or mathematical imprecision. What is prohibited is an arbitrary departure from the population standard required by the Constitution.

It is just such arbitrary disparity under state law which is proscribed by the Equal Protection Clause of the Fourteenth Amendment. That clause prohibits invidious discrimination; it does not invalidate a state statute based upon reasonable classifications which operates alike upon all persons similarly circumstanced.[2]

Transposing these principles, we think it apparent that the plaintiffs as voters are entitled to have their votes counted without arbitrary dilution. Indeed, that was the express holding of such cases as United States v. Classic, 313 U.S. 299, Ex parte Siebold, 100 U.S. 371, and United States v. Saylor, 322 U.S. 385. It is only arbitrary dilution which has been prohibited, however, and potentiality

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[2] See Mercy v. Doud, 354 U.S. 457; Ohio v. Dollison, 194 U.S. 445; Watson v. Nevin, 128 U.S. 578.

of dilution which can be completely avoided only at the cost of dilution of the weight of votes of others may be neither arbitrary nor unlawful. Indeed, a statutory scheme cannot be said to be unconstitutional, though it contains the seeds of possible dilution of some votes under extraordinary circumstances if the alternatives open to the legislature embodied more likely dilution of other votes in more frequent circumstances.

We turn then to the statute.

The plaintiffs concede, of course, the legitimacy of the statute's requirement that a vote may not be counted if a voter undertakes to vote for more persons than are to be elected. If there are ten members of the House of Representatives to be elected and a voter undertakes to vote for eleven or twelve, no one can say for whom he would have voted had he voted for only ten. Under no theory is he entitled to vote for more than ten. The plaintiffs, however, see no similarly legitimate objective underlying the requirement that he vote for no less than ten, though it is quite apparent to us it was inserted for the purpose of avoiding dilution of votes and achieving full participation of the electorate in ultimate decisions.

We have in hand a ready illustration in the complaint of the lady who, as a plaintiff in this case, asserts a right to vote only for female candidates. If she and her sisters vote only for female candidates officially on the ballot, while their husbands and brothers, in the voting booth less conscious of their sex, should vote for the number of persons to be elected, the effectiveness of the votes of the men is diluted by the concentration of the votes of the women. The women in voting for females alone do not dilute their votes by increasing the votes for any male opponent, and the men, voting a full slate and casting some of their votes for female candidates, are thus placed at a disadvantage with respect to the weight of their votes.

If there should be declared a constitutional right of the voter to vote for fewer than the number to be elected, as all of the plaintiffs contend, it would be a boon to minorities. By concentrating their votes upon one candidate, or two, they would avoid the dilution of the weight of those votes by votes for others running in competition with the favored candidate or candidates. Such a voting tactic, if permissible, would likely evoke counteraction, with a resulting deprivation to the state of full participation of the electorate in ultimate decisions.

An extreme example has been suggested. If five men are candidates for nomination to a four-member commission, uniform voting of each partisan for the one candidate of his choice could result in the nomination of four men, no one of whom had a majority, and of one or more by a very small proportion of the electorate. If A, B and C had many friends, each of whom voted for the one man he most favored, while D and E had few, but each of those few voted alone for the man he wanted, A, B and C would receive substantially more votes than either D and E, but neither one might receive a majority. D might, indeed, receive only a handful of votes, but a few more than E. D would be nominated, but a substantial proportion of the electorate would not have participated in the choice of D over E.

It was to avoid this sort of consequence that the Legislature included the requirement that each voter, in order to have his vote counted, must vote for a number of persons equal to the number to be nominated or elected. Applied to primaries, and this statute does apply to primaries as well as to general elections, it serves a legitimate and practical purpose. The requirement avoids rather than fosters possibilities of dilution of the weight of votes. It works similarly when applied to general elections so long as each of the opposing parties offers a complete slate of candidates, that is a complete slate for each office it wishes to contest. Thus, under the statutory

scheme, there would be no possibility of any one's vote being diluted in comparison with that of any other voter[3] if the Republicans, themselves, had offered a complete slate of candidates for the House of Representatives, or had offered none. The possibility of involuntary dilution in the weight of some votes arises only out of the decision of the Republican Party to offer an incomplete slate of candidates for the House of Representatives, a circumstance which was hardly contemplated by the Legislature of 1950 when it enacted the statute. This sort of avoidable difficulty creating a potentiality of dilution of the weight of votes, which even still may be avoided by resort to the write-in privilege, is not such a statutory defect which requires that the statute be declared fatally arbitrary in spite of its apparent legitimate basis.

Even in this situation, the statute may serve some legitimate purpose of the state by assuring a fuller participation of the electorate. A necessary result of the requirement is a greater number of cross votes than otherwise would be had. Under the requirement, the Republican nominees will receive the votes of some Democratic voters, who, for personal or other reasons, do not wish to vote for one or more of the Democratic candidates, while some Republican voters will affirmatively wish to support one or more of the Democratic nominees, or will vote for some of them, because the undertaking to have all Republicans resort to the write-in device will not be completely and entirely effective. If, then, the two Republican nominees receive enough votes for election, the determination of

[3] If one cross votes, dividing his votes among candidates of the two parties, he may dilute the weight of his vote in comparison with that of straight ticket voters, as we have seen, but that is his choice. Dilution is not the inevitable result of cross-voting, however. If the cross-voters are relatively numerous, the general election tends to resemble a primary, and the ultimate winners from both slates of candidates may be determined by the choices of the cross-voters.

those eight of the ten Democratic nominees, who are to be declared elected, will be on the basis of a fuller participation of the electorate. Indeed, if straight party voting was permissible and was universally followed, as the plaintiffs would have it, there would be no means of deciding which eight of the ten Democratic nominees had been elected if the two Republicans received a majority, for each of the ten Democratic nominees would have received the same number of votes. If the two Republicans are elected, the more cross-voting there is, the greater will be the participation of the electorate in the determination of which eight of the ten Democrats are elected to serve with the two Republicans.

Full participation of the electorate in the important process of selection of the individuals who are to represent its members in the House of Representatives is a legitimate objective of the state, and that objective is served by the statutory plan even in this extraordinary situation resulting from the Republican Party's presentation of a partial slate.

Though we recognize that the Republican nominees and their supporters are to some extent disadvantaged by the statute in this particular situation, it is a disadvantage which the Republican Party, itself, might have avoided, and still can largely avoid, by persuading its adherents to use the write-in privilege. By striking down the statutory requirement, however, we would expose other voters to disadvantage. Those disadvantaged under the statutory scheme as a result of their own doing have no constitutional right to relief when relief will impose disadvantage upon other voters who have no effective means of avoiding it. Indeed, the disadvantage suffered here by Republican nominees and their supporters is relatively slight, and balanced against it are the apparent purposes of the statute and its legitimate objectives to avoid other possibilities of dilution of the weight of votes and the promotion of the fullest participation of the electorate in the

selection of public officials. In short, we conclude that there is nothing arbitrary in the statutory plan, nor any requirement of the Fourteenth Amendment which would compel resort to some other alternative.

Our conclusion finds support in the few cases in which a similar problem has been considered. In Alsup v. Mayhall, S.D., Ala., 208 F. Supp. 713, a statutory District Court of three judges approved an Alabama statute requiring each voter in a congressional election at large to vote for eight, the number to be elected.[4] State courts dealing with similar problems have come to the same conclusion. Farrell v. Hicken, 125 Minn. 407, 147 N.W. 815; Orpen v. Watson, 87 N.J.L. 69, 93 A. 853, aff'd. 88 N.J.L. 379, 96 A. 43; cf. Griffin v. Trapp, 205 Ga. 176, 53 S.E. 2d 92, in which Georgia law was construed to permit a voter to vote for less than the number to be elected.

Whether or not the Legislature might have made a wiser choice is not a justiciable question. There are those who find desirability in some provision for minority representation, and various schemes for cumulative and proportional voting have their advocates. It was the Legislature's prerogative, however, to weigh the contending considerations and to make an enlightened choice among the several alternatives open to it. As long as the alternative it selected cannot be said to be arbitrarily unfair or discriminatory, it cannot be said to be impermissible under the Fourteenth Amendment.

The plaintiffs' additional claim that the statutory scheme conflicts with the Nineteenth Amendment is empty. Under the Nineteenth Amendment South Carolina may not

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[4] Alsup v. Mayhall was effectively overruled insofar as it approved the nominating process by Wesberry v. Sanders, 376 U.S. 1. This was recognized in a subsequent decision of the three judge court. Moore v. Moore, S.D., Ala., 229 F. Supp. 435. Neither Wesberry nor Moore, however, affects the authority of Alsup on the question with which we deal.

deny or abridge the right of citizens to vote on account of sex, but this statute contains no abridgement of the right. The statute is sexless. It draws no distinction between men and women voters. Every voter of whatever sex has the same right to vote subject to the same limitations. In exercising that right, of course, any voter who wishes to do so may found his choice upon the sex of individual candidates, but there is nothing in the Nineteenth Amendment which requires a state to afford to women voters opportunity to vote only for female candidates. However, as we have noted, a female voter in Richland County does have the right, if she wishes, to vote only for women, though, in a multiple office race, such as that of the House of Representatives, she is required to vote for ten persons. If there are not so many females among the official candidates, the statute itself makes the write-in procedure available to her.[5] By writing in the names of a sufficient number of other women, she can readly avoid dilution of her strictly female vote.

We conclude that South Carolina's requirement that, in multiple office races, each voter must vote for as many persons as are to be elected or nominated, is neither generally unconstitutional, as the plaintiffs contend, nor is it so as applied in the particular context of the impending general election in Richland County. The plaintiffs are not entitled to injunctive relief, and the complaint will be dismissed for want of equity.

Dismissed.

[5] Provision for write-in voting is expressly contained in § 23-357.

APPENDIX B

AMENDMENT I

"Congress shall make no law . . . .abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT XIV

"Section I. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

AMENDMENT XIX

"The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of sex."

42 U.S.C. § 1983

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1988

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindi-

cation, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 483

CHARLES E. BOINEAU, JR., ET AL., APPELLANTS,

versus

O. FRANK THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM

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Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, appellees move that the final judgment and decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

QUESTIONS PRESENTED

Although appellants list eight questions presented by this appeal (Jurisdictional Statement, pp. 2-3), appellees suggest that the substance of these questions may be stated as follows:

1. Whether Section 23-357 of the South Carolina Code of Laws which requires that each elector, who chooses to vote, exercise his full franchise by voting for as many candidates of a given classification as there are offices to be filled subjects appellants, as voters, to invidious discrimination?

2. Whether the statute denies and abridges the female appellant's right to vote on account of sex?

3. Whether the statute denies appellants, as candidates for state offices, due process of law and equal protection of the laws?

STATEMENT

Although appellants have known, or reasonably should have known since March 2, 1964, the date of the Richland County Republican Convention, that there would be two Republican nominees to oppose ten Democratic nominees in the Richland County House of Representatives election, appellants, by-passing the State Courts, waited until June 27, 1964, to bring this action in the Federal District Court for the Eastern District of South Carolina, Columbia Division, to enjoin the enforcement of Section 23-357 of the South Carolina Code of Laws. The matter was argued before a three-judge Court, specially constituted pursuant to 28 U. S. C. §§ 2281 and 2284, on July 30, 1964. By its order dated August 10, 1964, the District Court dismissed appellants' complaint. Notice of Appeal was given on August 13, 1964. Not until September 11, 1964, did appellants file their Jurisdictional Statement with the United States Supreme

Court. According to Rule 16-(1) of the Revised Rules of the United States Supreme Court, appellees would have thirty days from the receipt of the Jurisdictional Statement within which to file a Motion to Affirm; however, on September 23, 1964, appellants filed with the Court a Motion to Advance Oral Argument. Such motion, in appellees' view, was most premature and presumptuous. Its effect is to limit appellees' time, as a practical matter, in filing a Motion to Affirm.

Because Richland County is entitled to ten seats in the House of Representatives of the South Carolina General Assembly, each elector, as a result of Section 23-357 of the Code, must cast a vote for ten persons in order to have his ballot counted. These persons may be the nominees of political parties, whose names would ordinarily be printed on the ballot, or they may be any ten qualified electors of Richland County, whose names may be simply written in by the voter.

Although Richland County is entitled to ten House seats, appellants Boineau and Turbeville are the only candidates that were selected by the Republican Party to seek election in November to the House of Representatives from Richland County. The Democratic Party, on the other hand, nominated ten candidates in two primaries which were held during the month of June, 1964.

The action of the 1964 Richland County Republican Convention in nominating merely two candidates for the House of Representatives contest was inconsistent with that taken regarding the four member Board of Richland County Administrators in that a full slate of four candidates was chosen to oppose an equal number of Democrats. Such action also constituted a sharp departure from the campaign strategy which was employed in the 1962 House race when ten Republicans were nominated to offer for election.

When the South Carolina General Assembly, in the exercise of its power to determine the manner in which the right to vote was to be employed, adopted a new and vastly comprehensive election law in 1950, what now comprises Section 23-357 of the South Carolina Code was included. 46 S. C. Stat., Act No. 858, § 7(13), at 2092. The requirements of Section 23-357 were not entirely novel to the majority of voters in South Carolina. Since 1928, if not before, voters in a Democratic Party Primary, until recently, the only meaningful election in South Carolina, were required to vote for a full slate of candidates in the House of Representatives and County Commissioners races. "Rules of the Democratic Party of South Carolina," adopted May 16, 1928. Three other states, Alabama, North Carolina, and Louisiana, have similar provisions relating to various elections. 1961 *Acts of Alabama*, Vol. II, Act No. 154, § 2, at 2102; GENERAL STATUTES OF NORTH CAROLINA, § 163-175(6); 1950 LA. REV. STAT., § 18-351, at 939. It is almost impossible to determine the number of municipalities throughout the nation which may have a similar or like provision.

Apparently, appellants desire a "single shot" ballot so as to enable them and their political supporters to execute a maneuver which consists of casting their votes either solely for the two Republican nominees, or for two Republican nominees and a number of other candidates, which number, however, might be less than the full number required by Section 23-357. Recognizing that the statute had legitimate objectives, that it did not purposefully discriminate against appellants, and that the scheme advanced by appellants would operate to the disadvantage of other voters, the District Court dismissed the complaint.

In paragraph 4 of appellants' Motion to Advance Oral Argument, there is contained a misleading statement of fact regarding an order of the South Carolina State Board of

Voting Machine Commissioners with respect to the method of casting a vote for appellants Boineau and Turbeville. Not all votes for appellants need be written in. Only those voters who do not desire to vote for appellants and eight others whose names are on the official ballot and voting machines must write in appellants' names and those of eight other electors. Because of the nature of the voting machine and the requirements of Section 23-357, any voter who wants to vote for candidates whose names appear on the ballot and voting machines and for others not thereon must write in the names of all of the candidates for whom he votes. For example, should a voter desire to vote for two Democratic candidates and none of the other remaining ten political nominees, he would have to write in the names of the two Democrats and eight other qualified electors of Richland County. It is not just appellants, therefore, who are affected.

REASONS FOR GRANTING THE MOTION TO AFFIRM

1. As to whether Section 23-357 of the South Carolina Code of Laws, which requires that each elector who chooses to vote exercise his full franchise by voting for as many candidates of a given classification as there are offices to be filled, subjects appellants, as voters, to invidious discrimination.

Subject to the limitations of the United States Constitution, the several states have broad powers to determine the conditions under which the right of suffrage, once it is given, is to be exercised, *Lassiter v. Northampton Board of Elections*, 360 U. S. 45; *Pope v. Williams*, 193 U. S. 621. State action which affects one's vote is actionable under the Equal Protection of the Laws Clause of the Fourteenth Amendment where there is a showing that such state action subjects one to discrimination and unequal treatment, *Baker v. Carr*, 369 U. S. 186; *Snowden v. Hughes*, 321 U. S. 1; how-

ever, the equal protection clause prohibits only invidious discrimination. *Morey v. Doud*, 354 U. S. 457. A statute that is based upon reasonable classifications which operates alike upon all persons similarly situated does not violate the equal protection clause. *Watson v. Nevin*, 128 U. S. 578. Due process is similarly secured if the law applies to everyone alike, does not subject an individual to an arbitrary and unreasonable exercise of governmental powers, *Caldwell v. Texas*, 137 U. S. 697, and the means selected have a real and substantial relation to the object sought to be obtained. *Nebbia v. New York*, 291 U. S. 502.

In the Court below, there was an absence of any showing whatever that Section 23-357 of the South Carolina Code, a statute which has stood since 1950, and which is deeply rooted in the voting customs of the State's electorate, will subject appellants to purposeful discrimination. The statute applies to each elector alike in Richland County, regardless of the voter's race, sex, or party affiliation. All electors, not just the Republicans, must vote for ten persons in the House of Representatives contest, in order to have their ballots tallied. The principal object sought by Section 23-357 is to provide for the collective intent of the entire electorate; and the requirement that electors vote for as many candidates of a given classification as there are offices to be filled has a real and substantial relation to that end. Cf. *Farrell v. Hicken*, 125 Minn. 407, 147 N. W. 815, 1915B L. R. A. 401.

Appellants' complaint that the requirement that they vote for ten persons violates their constitutional right to have their ballots counted as cast is without merit. While a citizen has a right to vote free from arbitrary impairment, *Baker v. Carr*, *supra*, *U. S. v. Classic*, 313 U. S. 299, *U. S. v. Mosley*, 238 U. S. 383, *Ex Parte Yarbrough*, 110 U. S. 651, he does not have an absolute right to have his vote counted as cast. Here, appellants' votes will be counted, provided

they vote in accordance with Section 23-357 and other statutes relating to the elective process. The same rules will apply to everyone in Richland County who chooses to vote next November.

The equal protection clause guarantees that all voters shall have an opportunity to participate equally in the election of state legislators. *Reynolds v. Sims*, 377 U. S. 533. In the Richland County House of Representatives contest, there are twelve candidates who seek ten seats. Every qualified voter will have an opportunity to vote for any ten of them. Each voter, including appellants, will be permitted to vote for his favorite; but to qualify his vote, the elector must vote for nine additional persons because there are ten offices to be filled. Cf. *Alsup v. Mayhall*, 208 F. Supp. 713.*

Appellants maintain, however, that they are faced with the dilemma of either voting for candidates of whom they do not approve or not voting at all. Section 23-357 contains a write-in provision for those voters who disapprove of all or some of the candidates whose names appear on the ballot, and the task of writing in a name is in no sense an unjust discrimination. *White v. Frink*, 274 Ala. 49, 145 So. (2d) 435.

In assuming that every voter will vote either the straight Democratic ticket or for the two Republicans and eight Democrats, which are but two of several possibilities, appellants conclude that the necessary result of the requirements of Section 23-357 is to dilute and debase their votes. What is true in regard to the two Republican nominees and their supporters is equally true as to any two Democratic candidates and their supporters. Mathematics is not a respecter of party lines. If it is true, as appellants allege, that the full-slate requirement dilutes and debases their votes, such dilution can be avoided by the use of the write-in pro-

* *Alsup v. Mayhall* was overruled by *Moore v. Moore*, 229 F. Supp. 435, as to the question of congressional apportionment only.

cedure. Dilution of voting power is not inherent and unavoidable in this situation, as in *Reynolds v. Sims, supra;* and appellants' political remedies are not inadequate.

2. As to whether the Statute denies and abridges the female applicant's right to vote on account of sex.

The Nineteenth Amendment does not confer the right to vote but merely prohibits discrimination upon the basis of sex. *State v. Mittle*, 120 S. C. 526, 113 S. E. 345, cert. den., 260 U. S. 705; Cf. *Smith v. Blackwell*, 34 F. Supp. 989, aff'd, 115 F. (2d) 186. As Section 23-357 makes no reference to sex, it does not draw any distinction between male and female electors such as would bring about discrimination.

3. As to whether the Statute denies appellants, as candidates for state offices, due process of law and equal protection of the laws.

As appellants' rights, as candidates, owe their origin to the State of South Carolina, the assertion that Section 23-357 denies appellants due process does not present a substantial federal question. A right to a state political office is not a right of property or of liberty that is protected by the Due Process Clause. *Snowden v. Hughes, supra.*

In regard to appellants' contention that they are denied the equal protection of the laws as candidates, there was no substantial showing below that they will be treated any differently than the other ten political candidates involved. What applies to one, applies to all. It is not the fault of the State of South Carolina that the Richland County Republican Party chose to nominate an incomplete slate of House candidates. Should the Court conclude, however, that appellants, as candidates, will be subjected to discrimination by the enforcement of Section 23-357, such discrimination could have been avoided had the Republican Party of Rich-

land County acted responsibly. If there is any discrimination towards appellants, it is certainly not by invidious design of the statute.

CONCLUSION

We respectfully submit, therefore, that appellants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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No. 483.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CHARLES E. BOINEAU, JR., et al., *Appellants*

v.

O. FRANK THORNTON, Secretary of State of South Carolina, et al., *Appellees*

On Appeal From the United States District Court for the Eastern District of South Carolina

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§ 24-266, Virginia Statutes (Michie, 1950) 23

OTHER AUTHORITIES:

Cooley, *Constitutional Limitations* (8th ed., 1926) ... 12
Dewey, *Intelligence in the Modern World: John Dewey's Philosophy* (Mod. Lib. ed., 1939) 8
Fortescue, *De Laudibus Legum Angliae* (Ca 1470) .. 8
Greenberg, *Race Relations and American Law* (1959) 22
Hacker, *Congressional Districting* (1963) 18
Meiklejohn, *Political Freedom* (1960) 14
Sabine, *A History of Political Theory* (2d ed., 1950) .. 8
Stephenson and Marcham, *Sources of English Constitutional History* 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 483

CHARLES E. BOINEAU, JR., et al., *Appellants*

v.

O. FRANK THORNTON, Secretary of State of South Carolina, et al., *Appellees*

On Appeal From the United States District Court for the Eastern District of South Carolina

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PETITION FOR REHEARING

Now come Charles E. Boineau, Jr., William L. Turbeville, and Dolores R. Ellis and respectfully pray the Court to grant rehearing in this cause, and that the cause be set down for argument on the regular calendar.

It is said that hard cases make bad law. So, perhaps, may deceptively simple cases, in which the appearance of simplicity is contributed to by a lower Court decision which proceeds upon incorrect unexpressed premises and which treats the issues of the cause *simpliciter*. Such, appellants respectfully submit, is this case, be-

cause the District Court has for the most part treated the rights of voters as dependent upon, or at least a function of, the nature and rights of the candidates, a premise which is manifestly a false start which when pursued necessitates fallacious conclusions. In so doing, the District Court made its decision in terms which, with the authority of affirmance by this Court, constitute a landmark holding of catastrophic proportions upon the scope of the First Amendment, establish a major lin itation on *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and necessitate a major distinction from *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). In addition, the District Court decision embodies the novel proposition that the equal protection clause has no inhibiting force upon cumulating inequalities of burden upon voting rights unless any of them, standing alone, constitutes invidious discrimination. Appellants urge that the consequences, both in South Carolina and throughout the United States, of the District Court decision clearly deserve plenary consideration by this Court, because the District Court fairly establishes the following constitutional propositions:

1. That the right of a voter to choose among candidates, including the right freely to choose not to vote or to vote against any, is not protected by the First Amendment. To conceive of the First Amendment in these terms, appellants contend, is no less than to hold that means are protected while the major end for which these protected means exist is not protected. This view reduces the First Amendment to absurdity.

2. That *Reynolds* and the related reapportionment cases are to be read narrowly as having application only in the limited circumstance in which denial of equality of voting rights results from the creation of unequally

populated geographic areas as the basis for representation. So to read *Reynolds*, in the light of its application of the philosophy of "one man, one vote" enunciated by *Gray* v. *Sanders*, 372 U.S. 368 (1963), creates the paradox that the equal protection clause protects equality of voting rights as among areas, but not as among individuals within the same geographical area.

3. That denial of equal voting rights by a gerrymander of inclusion is not forbidden by the Constitution, including the Fifteenth Amendment, that the principle of *Gomillion* applies only to the gerrymander that excludes. In this regard, the present case squarely raises the issue whether the Fourteenth Amendment affords to all the same protection, as to gerrymandering by the reverse means, which the Fifteenth extends to Negroes under the specific circumstances of Gomillion. If the Fifteenth protects against the gerrymander by inclusion, are the voting rights of Negroes held to be greater than those of others?

4. That existence of a cumulation of undue burdens and consequent inequalities of voting rights is not to be considered in determining the application of the equal protection clause, so long as each separate burden is not sufficiently great to constitute invidious discrimination. So to hold reduces the protection afforded the voter by the clause to that minimum level which shocks the conscience. Cf. *Rochin* v. *California*, 342 U.S. 165 (1952).

It can require no argument to show that the fundamental nature of the right to vote imbues the propositions thus decided by affirmance of the District Court with grave consequences to the Nation's political system and its democratic institutions. While it may be that the Constitution requires the conclusions drawn by

the District Court, they manifestly invoke the most deliberate consideration before that constitutional compulsion is established. "[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 562.

Appellants emphasize that they bring this action not only as candidates, which two are, but as qualified voters, in their own behalf and in behalf of others similarly situated. Questions of far greater importance are raised by appellants in this capacity than in their capacity as candidates—questions which affect fundamentally the rights of voters regardless of party, and regardless of State of residence. While the opinion of the District Court, together with Appellees' Motion to Affirm, have given the misleading impression that this is a partisan action, such is by no means the case. And while Appellants' contentions as to their rights as candidates may, *arguendo*, be mooted by the election to be held on November 3, 1964, such is *not* the case with the contentions raised as to deprivation of rights as voters, for themselves and others similarly situated. After the election the act "remains in force and if the complaint were dismissed it would govern future election." *Gray* v. *Sanders*, 372 U.S. 368, 376 (1963). A cause may become moot only in part. *Blackman* v. *Stone*, 300 U.S. 641 (1937). And, if the rights of voter remain in question after the election as they do, the alleged "avoidability" of the denial of those rights upon the contingent acts of a political party organization is shown to have no effect upon the rights of the voters. The District Court's theory that denial of claimed voting rights, *while admitting that such a denial in fact exists*, could have been avoided in the coming election

by the action of a party nominating convention, is in actuality merely commending the denial of the voters' rights to a political remedy. This theory is precisely the same as though the Supreme Court in *Reynolds* v. *Sims*, 377 U.S. 533 (1964) had told the voters of Alabama to achieve equality of voting weight by moving from an overrepresented to an underrepresented political division. But the teaching of that case and of *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736-737 (1964) is that the existence of a political remedy is irrelevant in the consideration of alleged denial of voting rights.

Indeed, because of this very irrelevance, the decision of the District Court based upon a political remedy is no more that the question-begging reiteration of the political question doctrine upon the same ground found inadequate when phrased as "want of equity" in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964). Viewed in this light, the District Court is sowing confusion as to the applicability of *Wesberry* in cases involving State elections. Appellants had believed that this question was answered by *Reynolds* and by *Lucas* to the effect that cases involving the rights of voters in State elections were subject to the same standards of justiciability as those in Federal elections. Appellants urge that the District Court's decision, although ostensibly on the merits, was in actuality predicated upon assumptions regarding the political question doctrine which cast doubt upon the effect of existing political remedies which were laid to rest by *Wesberry*, *Reynolds* and *Lucas*.

The opinion of the District Court and the Appellees' Motion to Affirm likewise create the misleading impression that Appellants' concern is limited to the application of the equal protection clause of the Fourteenth

Amendment to the statute. This is far from the case: not only are issues regarding the equality of the effect of § 23-357, South Carolina Code, raised, but the even more fundamental question whether equality of voting power is meaningful without freedom of choice for the voter. Appellants contend that the effective equality of voting weight which this Court has required in *Gray* v. *Sanders*, 372 U.S. 368 (1963) and *Reynolds* v. *Sims*, 377 U.S. 533 (1964), as well as other cases relating to apportionment of state legislatures, is predicated upon the assumption of absolute liberty of choice by qualified voters among the available candidates. Recognition of the complementarity of freedom and equality of voting could hardly be more explicit than the statement that "the right to vote freely for the candidate of one's choice is of the essence of a democratic society and *any restrictions* on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U.S. 533, 545 (1964) (Emphasis added.) It would be little less than tragic if this Court's affirmance without argument, of the District Court's decision refusing to follow this doctrine, were to be read as a retreat from or qualification of its position in *Reynolds*.

An equally important proposition urged for the Court's consideration arises from the nature of several other cases which like *Boineau* v. *Thornton*, involve questions relating to the application of *Reynolds*. These are *Fortson* v. *Dorsey*, No. 178, October Term, 1964, and *Fortson* v. *Toombs*, No. 300, October Term, 1964, in which probable jurisdiction was noted on October 5, 1964; and *Scranton* v. *Dre* , No. 201, October Term, 1964, upon which the Court has not as yet acted. *Boineau* v. *Thornton* relates to these cases in that it,

like *Fortson* and *Scranton*, involves the question of a denial of voters' rights which arises out of the existence of multi-member districts for the choice of State legislators. As appears more fully below, Appellants contend that affirmance without argument of *Boineau* v. *Thornton*, necessarily involves the assumption voters' rights do not in any event depend upon the existence of such multi-member districts. Without such at-large elections, § 23-357 would have no effect other than as it relates to determination of voter intent. This fundamental relationship suggests that *Boineau* should be argued together with *Fortson* and with *Scranton* should the Court find probable jurisdiction in the latter.

This petition is not brought lightly, but out of deep conviction of the importance of the issues involved, especially grave among these being the question of compelled voting. This question is too significant to be decided on the merits by summary affirmance of the District Court decision without argument, because of the weight of authority accorded an affirmance.

Plenary consideration would appear to be amply warranted alone by the question of the protection of the right of choice in voting under the First Amendment, clearly of greater public importance throughout the Nation than questions involved in other cases in which rehearing was granted after plenary consideration and after announcement of opinions, *Elgin, Joliet & Eastern Ry. Co.* v. *Bailey*, 325 U.S. 711, 326 U.S. 801, 327 U.S. 661; *Graves Mfg. Co.* v. *Lynde Co.*, 336 U.S. 271, 337 U.S. 910, 339 U.S. 605, and of public importance at least equal to those involved in *Reid* v. *Covert* and *Kinsella* v. *Krueger*, 351 U.S. 487, 352 U.S. 813, 354 U.S. 1.

I.

Liberty of political choice is guaranteed by the First and Fourteenth Amendments, and is denied by § 23-357, South Carolina Code, which compels voters to vote for a fixed number of candidates.

The fundamental postulate upon which American political institutions rest is that governments derive "their just powers from the consent of the governed." Declaration of Independence. This political postulate rests upon the belief that "no man or limited set of men is wise enough or good enough to rule others without their consent." Dewey, *Intelligence in the Modern World: John Dewey's Philosophy*, 400-401 (Mod. Lib. ed., 1939). That consent lies as the foundation of legitimate government is at least as ancient in Anglo-American law as 1470. "[The king] cannot alter the laws, or make new ones, without the express consent of the whole kingdom in Parliament assembled." Fortescue, *De laudibus legum Angliae*, Ch. XXXVI, (ca. 1470). The function of the election of representatives, by whoever might be qualified to vote under prevailing laws from Lancastrian Parliament to the present day, is the derivation of the consent of the governed to the framing of laws by their representatives. It is so apparent as to be axiomatic that if the consent of the governed is to be effective, it must be freely given. Compelling consent to be governed by this or that representative is tantamount to Rousseau's philosophy of "forcing a man to be free." And "forcing a man to be free is a euphemism for making him blindly obedient to the mass or stronger party." Sabine, *A History of Political Theory*, 591 (2d ed., 1950).

Indeed, the freedom of electoral choice in English law antedates the Lancastrian formulation of the theory

of the consent of the governed. In 1406, abuse and favoritism in the election of knights of the shire were the subject of statutory regulation: "all who are there present, as well suitors duly summoned for this purpose as others, shall attend to the election of their knights for the parliament, then freely and impartially proceeding with that election, any command or request to the contrary notwithstanding." 7 Henry IV: On Elections to Parliament (1406) (Stephenson and Marcham, *Sources of English Constitutional History*, 276). Electors were charged to "make open and free election according to law" upon the Stuart accession. James I: Proclamation concerning Elections (1604) (Stephenson and Marcham, *op. cit.*, 407). The great Bill of Rights of 1689 among its remonstrances, held "that election of members of parliament ought to be free." Stephenson and Marcham, *op. cit.*, 601 (1689). Upon acceptance by William and Mary, the Bill became 1 William and Mary, St. 2, C.2. There seems at no time since the Bill of Rights to have been a question as to the freedom of electoral choice. So completely had this fundamental freedom been absorbed into Anglo-American law by the time of the Revolution and thereafter that it seems never again to have been the subject of debate. Rather, the debate regarding suffrage that continued from the Revolution to the Nineteenth Amendment was with regard to property or other qualifications for its exercise.

A. The freedom of the voter to choose among candidates, to vote for persons not candidates, to vote against rather than for, or not to vote at all is guaranteed by the First and Fourteenth Amendments.

With reference to election of United States officers, the Court has said: "it is the duty of that government

to see that he [the voter] may exercise this right freely .... This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself . . : that the votes by which its members of Congress and its President are elected shall be the *free* votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." *Ex parte Yarbrough*, 111 U.S. 651, 662 (1884). The right of Yarbrough did not arise from the statute enforcing it. Nor did it arise, unless as a special protection accorded Negroes and not others by the Fifteenth Amendment, for the Court in that case itself finds that no new rights were created by the Fifteenth Amendment. *Cf. The Slaughterhouse Cases;* 16 Wall. 36 (1873); *Minor* v. *Happersett*, 21 Wall. 162 (1875). This being the case, freedom in the exercise of Yarbrough's right to vote was a pre-existing right of those who could vote before the passage of the Fourteenth and Fifteenth Amendments. This right, unless inherent as a privilege or immunity of United States citizenship most logically finds its source in the First Amendment. A strange anomaly would be presented if Appellants' rights were distinguished from those of the voters in *Yarbrough*. Assuredly voters for state offices have the same freedom as voters for United States officers. Assuredly the "necessity of the government" is as great for the States as for the United States. The right to vote, and of necessity the right to vote freely as well as equally, is protected by the Constitution "in state as well as federal elections." *Reynolds* v. *Sims*, 377 U.S. 533, 544 (1964).

Voting, then, is a privilege of individual citizens bestowed for the purpose of gaining the consent of the

governed by a *free expression* of their hopes and desires. Voting as a mode of expression, like others political and non-political, is exercised under the protection of the First Amendment, made applicable to the States by the Fourteenth. The words of Mr. Justice Jackson overturning the compulsory flag salute are equally applicable to compelled voting: "We set up government by the consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 641 (1943).

How much more essential it is to preserve freedom of the voter's choice than the right of school children to remain silent is clear because voting is "a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886); *Reynolds* v. *Sims*, 377 U.S. 544, 562 (1964). Like the flag salute statute, the requirement of § 23-357 that persons vote for ten State Representatives in Richland County "requires affirmation of a belief and an attitude of mind." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 633 (1943).

The effect of § 23-357, South Carolina Code, is to impair substantially the freedom of choice of South Carolina voters regardless of party in elections in which the words "or less" are applicable. To require a voter who chooses to vote only for a single candidate where there are more than one person to be elected is to impair the voter's freedom of choice, because he is thereby required to vote against the candidate of his choice. This is equally true whether the single candidate chosen to receive a vote is a single candidate running against a slate, *or a single nominee from a slate*. Directly in point is *Griffin* v. *Tapp*, 53 S.E. 2d 92, 205

Ga. 176 (1949). "The right to vote against some one is held as sacred by some as the right to vote for another, and the fact that an elector exercises both rights at the same time, when the opportunity to do so is afforded, would not render his ballot illegal and prevent it from being counted." *Griffin* v. *Trapp, supra*, 96. To the same effect is *Brannon* v. *Perkey*, 31 S.E. 2d 898 (1944). "A voter is not required to vote for every office to be filled at an election." *d.* at 902, citing Cooley, *Constitutional Limitations*, 1388 (8th ed., 1926). And the Supreme Court of Missouri, overturning a poll tax law framed so as to penalize non-voters: "In the exercise of the right of suffrage a voter is sovereign and has the right to vote or to refrain from doing so. If it were otherwise the right would cease to be sovereign . . . That it is not within the power of any legislative authority, national or state, to compel the citizen to exercise his sovereign right, seems to have been the common understanding of our people from the beginning of our national existence." *Kansas City* v. *Whipple*, 38 S.W. 295, 296, 136 Mo. 47 (1896). The Missouri constitutional provision so interpreted was substantially the same as that of South Carolina, "All elections shall be free and open and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public offices." S.C. Const., Art. I, § iv. Also see *People* v. *Deatherage*, 81 N.E. 2d 581 (1948) to the same effect. The true purpose of an election in South Carolina, or elsewhere, is "to ascertain and declare the will of the majority." *Easler* v. *Blackwell*, 10 S.E. 2d 160, 195 S.C. 15 (1940); *Redfearn* v. *Board of State Canvassers*, 107 S.E. 2d 10, 234 S.C. 113 (1959). "If we are to follow the principle that effect must be given to the intent of the voter

where such intent can be determined with reasonable certainty, we must do so by giving as much effect to his intent not to vote, or to cancel his vote, as we do respecting his intent to cast a vote." *Petition of Wade*, 121 A. 2d 551, 553; 30 N.J. Super. 510 (1956). Liberty of electoral choice is thus denied whether the voter yields to the compulsion of § 23-357 and votes for those he does not prefer or whether he refuses to yield to the compulsion of § 23-357 and forfeits his expressed choice by the invalidation of his ballot.

The effect of § 23-357, taken as a whole, is to require the voter on pain of not having his vote counted, to vote for persons he does not prefer and for whom he does not in truth freely choose to vote. This compulsion of § 23-357 exists whether the petitioners make the Hobson's choice of voting for eight Democrats or for eight write-in candidates. The availability of write-in possibilities and the requirement of this alternative to voting for Democratic candidates is still a denial of the freedom of petitioners to vote, to vote for whom they choose, or not to vote at all.

Nor may this denial of constitutional right be justified on the ground, as the District Court would have it, that it is a legitimate policy to stimulate political participation and avoid factionalism within a party. Again, Mr. Justice Jackson might have been speaking of this contention when he wrote: "Unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievements. . . . To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the ap-

peal of our institutions to free minds .... If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 640, 641, 642 (1943).

If South Carolina may without infringing the First and Fourteenth Amendments require Richland County voters to vote for ten State Representatives, whether party nominees, independents, or write-ins, it may require that a voter vote for all candidates on a ballot. If South Carolina may constitutionally invalidate the votes cast for fewer than ten State Representatives in Richland County, it may require invalidation of a voter's entire ballot unless he casts a vote for every office to be filled. The effect of such requirements should the entire State Legislature, as well as Congressmen, be elected at large makes of voting a chore which staggers the imagination. Voters can hardly be expected to make intelligent choices while filling blanks for every office on a ballot as big as a bed-sheet.

"[F]reedom from duress is guaranteed to every citizen as he makes up his mind, chooses his party, and finally casts his vote. During that process, no governing body may use force upon him, may try to drive him or lure him toward this decision or that, or away from this decision or that .... [The First Amendment] expresses the constitutional authority, the legal power, of one who governs to make up his own mind without fear or favor, with the independence and freedom in which self-government consists." Meiklejohn, Political Freedom, 119-120 (1960). The preservation of

self-government depends upon the elimination of initial encroachments upon its bases. The guaranty of equality of voting without a guaranty of liberty of voting choice merely sets the rabbit to guard the lettuce patch.

B. Liberty of political choice to vote for all, some, or none of existing candidates, or for no candidate is additionally and specially guaranteed against abridgement by the Fifteenth and Nineteenth Amendments.

"The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women." *Gray* v. *Sanders*, 372 U.S. 368, 379 (1963). Denial of liberty of political choice abridges the right to vote, since voting under any degree of duress loses all sanctity and becomes valueless, both to the voter and to the society. It is in this wise that the right of Appellant Ellis and of women voters similarly situated is abridged. The Nineteenth Amendment, like the Fifteenth, protects not only against positive discrimination, but must work as well to put women and Negroes upon the same footing of freedom in casting their votes as was enjoyed by white males before the passage of the Amendment. That the Fifteenth Amendment has this affirmative thrust, as well as a negative thrust more commonly attributed to it, is confirmed by the Court's statement that Negroes under the Amendment were as respects voting to have "the same right as white persons." *Ex parte Yarbrough*, 110 U.S. 651, 665.

It has been held that no new rights were created by these Amendments, but that their force is to remove impediments which otherwise the States could impose

as qualifications. The removal of impediments would be incomplete if only those relating to qualification were removed, while still permitting the imposition of impediments in the voting booth, including impediments to freedom of choice. In short, two great classes of voters are specially and additionally protected from differentiation in choosing candidates and casting ballots for them by the Fifteenth and Nineteenth Amendments.

In considering a statute's restrictive effect upon personal liberties protected by the Constitution, the Court "has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940); *Winters* v. *New York*, 333 U.S. 507, 518-520 (1948); *NAACP* v. *Button*, 371 U.S. 415, 432 (1963); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 516 (1964). Because voting rights are such "personal rights," *U. S.* v. *Bathgate*, 246 U.S. 220, 227 (1918); *Reynolds* v. *Sims*, 377 U.S. 533, 561 (1964) it is not inappropriate to advert to other possible applications of § 23-357 than those involved in the case at bar. South Carolina, like other Southern States, possesses significant numbers of Negro voters. Applying § 23-357 to primaries of the Democratic Party, for example, a Negro candidate for nomination to the House of Representatives, competing against ten white candidates for ten seats in the State House, would find nomination almost impossible, as ten votes would be required for the Negro candidate to equal one vote for any white candidate, regardless of how the voters for the Negro candidate disposed of their nine compelled votes. Should Negro voters exercise their freedom of political choice, doubly protected by the Constitution, by voting

only for the Negro candidate, their votes would be nullified by the application of § 23-357.

In a parallel situation, women who exercised their right to vote freely by voting only for a woman candidate, would find that § 23-357 accomplished the same abridgement of their voting rights as that suffered by Negroes. It is for this protection of the Nineteenth Amendment that Appellant Ellis contends. There is no contention that women are entitled by that Amendment to have women candidates on the ballot, but it is contended that the Nineteenth Amendment as well as the First and Fourteenth Amendments protect women in the right to choose to vote for women candidates, as the Fifteenth protects the right of Negroes to vote for Negro candidates.

True, as the District Court said, the statute is sexless. It is also raceless. But it holds high potential for the concentration of control of the Democratic primary, until recently, as Appellee correctly states, "the only meaningful election in South Carolina" (Motion to Affirm, 4) in white, male Democrats. Its potential for contral of general elections by the same white, male Democrats is hardly less. That same potential exists for the control of the entire electoral process with regard to any minority group or groups.

II.

Equal representation is denied and majority rule is left to chance by the type of gerrymander imposed by § 23-357.

The Court has held three different types of gerrymander to fall within Constitutional inhibitions: *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Gray*

v. *Sanders*, 372 U.S. 368 (1963); *Reynolds* v. *Sims*, 377 U.S. 533 (1964). These factual contexts might be described respectively as gerrymander by exclusion, gerrymander by sublimation of the popular vote, and gerrymander by disproportionate representation. Appellants urge that § 23-357 creates a gerrymander by inclusion, which results in unequal representation because of the requirement that persons waste votes. Cf. Hacker, *Congressional Districting*, 46-63, especially 49 (1963). Where one party fails to nominate a complete slate of candidates for a multi-member district, the application of § 23-357 requires that voters of that party waste votes in some fashion, either by write-in or by a vote for the candidate or candidates of another party. Thus, "one man, ten votes" in the context of the case at bar does not represent the same necessary equality of voting power as is required by the "one man, one vote" principle of *Gray* and *Reynolds*. Not only does South Carolina law not require a party to nominate full slates of candidates for multi-member districts, but research fails to disclose any such requirement in the law of any State. Absent such a requirement, the necessity of wasting some votes to preserve others not only impairs the equal basis of representation, but leaves majority rule to chance. Here, as in *Gomillion*, the situation may be one in which a minority political group threatens the control of the statewide majority in an area of the state. Here, rather than the exclusion of the minority from the local political area, as in *Gomillion*, or the division of the local area into smaller areas (single-member districts) which would guarantee some majority group representation and some minority representation, the tendency toward unequal representation inherent in a multi-member district is enhanced by § 23-357.

Because the purpose and effect of the gerrymander is to maximize the effectiveness of one group's voting power and minimize that of another group, whether racial, ethnic, or political, the suggestion in the Government's *amicus curiae* brief in *Maryland Committee for Fair Representation* v. *Tawes*, 377 U.S. 656 (1964) that it is possible to consider equality of representation while laying aside the question of the gerrymander is unrealistic and is conceptually impossible. The practical results of the attempt to deal with equality of representation without the gerrymander problem is to retain the conditions that prevent equality of representation but to require geographic rearrangement alone. A bare majority of even a dominant minority, as in *Gomillion*, whether a minority of race, political persuasion, or occupation, can achieve as much as 100% representation in a multi-member legislative district by the gerrymander of inclusion, involved in *Boineau*, *Fortson*, and *Drew*, as easily as by the gerrymander of exclusion, of sublimation of votes into units, or of disproportionate representation. Rural representation in Alabama can not only be maintained in control, but increased by election of that State's legislature at large. The equality of voting strength attained thereby is illusory, if there is a majority of rural voters in the State. In such a situation, the application of a statute similar to § 23-357 would strengthen the probability of dominance by the rural voters because it would strongly tend to concentrate party control in the hands of the rural-dominated party organization. This tendency exists at the level of the primary election regardless whether the state is dominated by a single party or has a strong two-party system.

At the level of the general election, a statute of the type of § 23-357 would have the same effect of disproportionately increasing the voting strength of a heavily dominant majority. But in areas, state or other electoral division, where there is even a moderately developed two party system *the application of such a statute leaves majority rule to chance even if both parties nominated full slates* of candidates for all multiple-candidate offices. The death or other disqualification of one person from a slate on election day or too soon before to permit the replacement of a candidate as provided by law, would in all probability result in the invalidation of many votes cast for the slate of which the deceased was a part. It should be observed that § 23-357 applies not only to legislative delegations, but also to slates of Presidential Electors, and municipal councillors. It would also apply to election of United States Congressmen should the State decide to elect its national representatives at large. The effect of a statute like § 23-357 in States in which a substantial minority elects some Congressmen in single-member districts should the state-wide majority decide upon election at large rather than reapportionment is apparent.

It is because the vice of § 23-357 is felt in multi-member constituencies, and has no effect except as to voter intent in single-member districts, that Appellants feel that *Boineau* is intimately related to *Fortson* and *Scranton*. All three involve applications of *Reynold*, that arise from the existence of multi-member legislative constituencies. Appellants are at a loss as to why, if the questions raised by *Fortson* and *Scranton* are open, the question in *Boineau* as to voters rights is satisfactorily closed by the opinion of the District

Court. § 23-357 piles the Ossa of compulsory voting on the Pelion of the multi-member district. Can Ossa hang suspended unless it is the purpose of the affirmance to teach that the guaranties of free expression of the First Amendment extend only to the point where they are most crucial: the ballot box? Appellants are loath to believe that this question would be disposed of without plenary consideration, if indeed the answer is not so clear as to warrant summary reversal of the District Court.

III.

Equal protection of the laws is denied by the enforcement of the words "or less" of § 23-357, South Carolina Code, because those words have no reasonable relation to the legitimate purpose of the statute, which is determination of the intent of the voter.

Appellees admit that "one of the purposes" of § 23-357 is to authorize that a vote not be counted where it is impossible to determine the voter's choice for an office to be filled. This admission raises unavoidably the question of what other legislative purpose or purposes could exist, and whether these are legitimate ones under the Constitution of the United States. The District Court found that the purpose of the statute was to encourage voter participation and avoid factionalism. It is abundantly clear, however, that as desirable as voter participation may be, compelled voting under § 23-357 is not a constitutionally acceptable method of its achievement, abridging as it does the fundamental freedom of electoral choice upon which our institutions rest and which is protected by the First and Fourteenth Amendments. Further, this alleged legislative purpose is not evident in regard to other

elections than those for multi-candidate offices. As regards single-candidate offices, such as that of Governor, the statute speaks only the language of voter intent, being completely inapplicable in other sense to such offices. Not only is it unlikely that a legislative purpose of assuring increased voter participation exists in a statute effective in one type of office and not in others, but the very terms of § 23-357 negative this purpose. It is difficult to see how the disfranchisement which § 23-357 imposes as a penalty for failure to participate fully in the election supports this ostensible purpose.

Rather, the legislative history of the statute tends to support the belief that an entirely different, yet still illicit, purpose accounts for the anomalous words "or less." Appellant has pointed out that the present § 23-357 was adopted in 1950, embodying one of the 1928 Rules of the Democratic Party of the State. (Motion to Affirm, 4). It is of great significance in determining the legislative purpose in the adoption of § 23-357 that certain key rules of the Democratic Party were held unconstitutional in 1947 and 1948. *Rice* v. *Elmore*, 165 F. 2d 387 (1947), certiorari denied, 333 U.S. 875 (1948); *Brown* v. *Baskin*, 78 F. Supp. 933 (1948). If the purpose of the adoption of § 23-357 was to accomplish the purpose of the unconstitutional rules, restraint on Negro participation in the Democratic primary, this surely is inadmissible as a legitimate purpose to sustain the inclusion of the words "or less" in what is otherwise a statute directed to the determination of voter intent. That restraint on Negro participation is a major effect of the statute is beyond doubt. *Cf.* Greenberg, *Race Relations and American Law*, 152, (1959), considering similar statutes in relation to restrictions on Negro candidacies.

Because neither denial of freedom of political choice generally, nor restriction of Negro participation can constitutionally sustain the words "or less" of §23-357, the section speaks solely in terms of the purpose of authorizing votes not to be counted where it is impossible to determine the voter's choice and intent. The offending words not only have no rational relation, but no relation to the determination of a voter's choice and intent. Appellant has conceded that the State may constitutionally provide that a vote not be counted where it is in truth impossible from the method of voting to determine the voter's choice among candidates. Such an impossibility arises when the voter votes for *more* persons than there are offices to be filled; which of those would represent his choice is impossible to determine. The same is true if the voter votes for no candidate for an offiffice. Many states provide for the invalidation of votes where there are *more* persons voted for than offices to be filled or where it is otherwise impossible to ascertain the voter's choice. Some specifically provide that votes are not to be invalidated where fewer persons are voted for than offices to be filled. *E.g.*, § 3-1006, Arkansas Statutes (1956); § 15.-15.360(3), Michie's Alaska Statutes (1962); § 11-64, Hawaii Rev. Statutes (1955); § 24-266, Michie's Virginia Statutes (1950). Such specific provisions indicate recognition that *voting for fewer persons than offices to be filled is a clear expression of voter intent.* Because as much weight must be given to intent not to vote as to intent to cast a vote, *Petition of Wade*, 121 A. 2d 552, 30 N.J. Super. 520 (1956), the words "or less," of § 23-357 of the South Carolina Code have no relation to the impossibility of determining a voter's intent. His intent is clear: it is to vote for those voted for and no others. It is difficult to perceive how the

"collective intent of the entire electorate" (Motion to Affirm, 6) can be ascertained by distortion of the intent of individual voters, or the elimination of the opportunity to express any electoral intent at all. The determination of a "collective intent" that is greater than the sum of individual intentions is more than reminiscent of the Hegelian "true will" of the citizen, which that philosopher identified with the will of the State. This metaphysical concept of "true will" (or collective intent) was one of the keystones of Nazi tyranny.

Legislative establishment of classifications without a rational basis is a denial of equal protection of the laws. *Truax* v. *Corrigan*, 257 U.S. 312 (1921). Likewise, equal protection of the laws precludes irrational discrimination as between persons or groups in the incidence of a law. *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948). The rule of classification may not violate specific constitutional policy or introduce differentiations that are invidious or irrelevant to any tolerable purpose. This § 23-357 clearly does, by the words "or less". A class of voters whose votes are not to be counted is established by the offending words, the members of which are denied personal rights. That one elector may express his intent to vote for ten candidates and another not express his intent to vote for two, five, or seven, introduces a marked element of irrationality and irrelevance into the incidence of § 23-357, unless the violation of specific constitutional policy is permitted. The very irrelevance of the words "or less" to any tolerable purpose assuredly constitutes invidious discrimination against those who are partly disfranchised. Such discrimination, whether "ingenious or ingenuous" cannot pass muster under the Four-

teenth Amendment. *Smith* v. *Texas*, 311 U.S. 128, 132 (1940); *Cooper* v. *Aaron*, 358 U.S. 1, 17 (1958).

IV.

Equal protection of the laws is denied by §23-357, South Carolina Code, which, as construed and applied, places a variety of burdens upon the voting rights of Appellants and other voters similarly situated that are not placed upon other voters.

A. § 23-357 operates upon the basis of a constitutional irrelevance as to legislative purpose.

The legislative history of § 23-357, adverted to in argument above, supports the belief that the true legislative purpose of the section was by subtle and sophisticated means to counter the effects of the South Carolina White Primary Cases, *Rice* v. *Elmore* and *Brown* v. *Baskin*. But the Fourteenth Amendment forbids "sophisticated as well as simple-minded modes of discrimination". *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939); *Reynolds* v. *Sims*, 377 U.S. 533, 563. It is, of course, no defense for § 23-357 that while discrimination was the purpose, the section in actual practice does not discriminate against the intended group (if, indeed, it does not) but discriminates against another group. Nor, equally, is it a justification of discrimination in political rights that a political remedy may exist. *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736-737. From the standpoint of voters, many of whom may belong to no party, the action of a political nominating convention is a merely political remedy. The voter in South Carolina under § 23-357 stands in the same relation to the Republican nominating conventions that any United States voter stands in relation to the Democratic and Republican National Con-

vention. The former may as well be told by the voter "nominate ten candidates for the Richland County legislative delegation" as the latter may be told to nominate better or differently qualified persons for President. Moreover, the very discrimination that exists may prevent effective resort to the legislative process that can ordinarily be expected to bring about the repeal of unjust legislation.

Needless to say, with the exception of conspiratorial subversive parties, political belief "is constitutionally an irrelevance" like race, creed or indigence in legislative classification. *Edwards* v. *California*, 314 U.S. 160, 184 (1941). Yet the District Court found § 23-357 as a matter of fact to be discriminatory against persons who might wish to vote for certain candidates. Having made this finding, the District Court nevertheless dismissed because the discrimination was not invidious. Appellants submit that if political belief is "constitutionally irrelevant" as a basis for legislative classification, the act of putting political belief to work through the suffrage is also "constitutionally irrelevant" in this wise. This being true, the statute must fall without the necessity of a finding of indiviousness. Classification upon a "constitutionally irrelevant" basis is invidiousness by constitutional definition. Nor is a statute which classifies upon this "constitutionally irrelevant" basis one which operates upon all people equally, since § 23-357 imposes an orthodoxy of political act in voting which stifles heterodoxy in political belief. Duly qualified voters are entitled to exercise their franchise in a manner in which some do not suffer burdens not imposed on others by reason of their political belief or persuasion. Equality of political choice is assuredly at least as much "of the very essence of the

personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure" as is "the right to work for a living in the common occupations of a community." *Truax* v. *Raich*, 239 U.S. 33, 41 (1915).

B. § 23-357 imposes differing burdens among voters in the manner of voting, depending upon variation of political belief and preference, and debases the weight and effectiveness of some votes in comparison with others.

The enforcement of § 23-357 is accomplished in Richland County, with the exception of the counting of paper absentee ballots, by the manner in which voting machines are constructed. A device known as a lockout bar permits the counting of votes for State Representative when voting levers are depressed either for ten candidates named on the machine or for ten write-in candidates. Depressing the "straight ticket" lever at the top of the party column depresses levers for all candidates of that party, including all nominees of that party for State Representatives but depresses *only* such levers and prevents the depressing of *any other* levers, including write-in levers. If any party has fewer nominees for State Representative than the prescribed ten, the construction of the voting machine to enforce § 23-357 prevents voters from voting that straight-party ticket, or prevents his votes for State Representative from registering. Thus, the statute imposes upon certain voters not only the burden of depressing all levers for the party of his choice, but of familiarizing themselves with the operation of the voting machine to acquire safety from casting away his votes for State Representative under the impression that he is casting votes for them. The party which

has a full slate is the beneficiary, however, of the ability of its supporters to cast straight-ticket votes. This differentiation may in itself be only a minor inconvenience, but far more seriously discriminatory effects flow from it.

Voters who do not wish to vote for any nominees of the party with the full slate must write in the names of ten persons in order to vote for any person for State Representative, because no combination of votes for candidates named on the ballot and write-in candidates will release the lock-out bar. § 23-357 provides that write-in votes may not be cast for persons whose names appear as nominees. The determination of the State Board of Canvassers, among the appellees of record, that such votes will be counted does not alter the discriminatory force of the section in this regard. Compliance with the statute, which is evaded by the ruling of the Board of Canvassers when voting machines are used means necessarily that voters may not vote for two nominees of one party without voting for eight nominees of the other party. Voters, then, who do not choose to vote for any nominee from the full slate are required to violate the statute by write-in votes for candidates named by the party with less than a full slate or are required to forego voting for those candidates by depressing levers for them. Rigorous enforcement of the statute, to which appellees are sworn, requires that write-in votes for persons named on the ballot be invalidated, leaving other write-in votes also invalid for failure to cast valid votes for ten. A statute which as construed and applied, without evasion by the very authorities charged with its enforcement, requires a voter to vote eight times for the opponents of the candidates of his choice in order to cast two votes

for the candidates of his choice dilutes the effectiveness of that voter's vote in comparison with the effectiveness of a voter who can get full value of votes for ten candidates for whom he chooses to vote. This statute is no more than an attempt at legalized stuffing of the mechanical ballot box. This stuffing on behalf of the party with the full slate arises from the operation of the statute whether by the dilution and debasement of some votes in relation to others or by the failure to count the votes of some voters and not of others. Although more subtle in its operation than the denial of equal protection found in *Reynolds*, the discrimination imposed is undeniably sufficiently invidious, i.e., unjust, to bring the statute within the constitutional prohibition.

Assuming *arguendo*, which appellants emphatically do not concede, that appellees may forswear their duty to enforce § 23-357 according to its terms in order to avoid the expense of printing paper ballots or in order to avoid demonstrating the indiviously disriminatory effect of the section, the methods of voting for ten persons without voting for as many as eight nominees of appellees' party impose additional burdens on voters who wish to accomplish this purpose. It has been pointed out that to avoid casting at least eight votes for the party with the full slate of nominees, ten write-in votes must be cast, or the voting machine will count none. This requirement imperils the secrecy of voting in at least two ways: (1) because it takes appreciably more time to write-in ten names than to vote a straight ticket, those who spend a short time in the booth are readily identified as the party faithful; and (2) because the writing of ten names lends itself to the identification of persons who cast write-in votes by com-

parison with handwriting samples acquired in voter registration. A statute which so imperils the secrecy of the ballot is a powerful stimulus to voting as expected by the dominant group, smothering the expression of divergence of political beliefs.

Furthermore, the difference in time required for voting a straight ticket and a write-in ticket makes it possible for more voters to vote by the former method than by the latter. The statute permits stuffing the voting machine in this way, as well as by dilution of the weight of some votes.

In any event, a write-in vote is cast at the voter's peril, because § 23-357 requires write-in votes to be cast for *qualified* persons. The burden of determining that the party nominees are qualified does not, of course, fall on the straight-ticket voter. A write-in vote for a non-qualified person would presumably invalidate all other write-in votes cast by the voter.

Although appellants do not contend that there is a constitutional right to vote by voting machine, it is submitted that a statute which has one effect where voting machines are used and another where paper ballots are in use creates a differential burden upon the machine voter by making machine-voting more difficult and more susceptible to error than paper ballot voting. Indeed, an election statute which in its nature cannot be applied in the same manner to paper ballots and voting machines is of doubtful rationality. That the State Board of Voting Machine Commissioners may decide to revert to paper ballots to prevent some of the discriminations under § 23-357 is merely another political remedy to which voters are left by the District Court.

Voters who do not wish to vote for a complete ticket of the same party are placed in the position of having to cast a preferential ballot, where no means is provided for registering preferences. On the other hand, voters who wish to vote a straight ticket for a full slate will automatically have their preference: that is, equal preference based on party. For this reason, a majority of voters whose first preference is an independent may be unable to elect the person of their choice because of the additional weight to other candidates of their wasted votes. In this way, surely, majority rule is left to chance. The District Court relies upon *Farrell* v. *Hicken*, 125 Minn. 407, 147 N.W. 815 (1914) and *Orpen* v. *Watson*, 87 N.J.L. 69, 93 A. 853 (1915) in support of the proposition that compelled voting is not unconstitutional. In both these cases, however, the ballots involved were preferential in nature and voters were given the opportunity to express preferences among candidates in numerical order. Even conceding, which appellants do not, that the expression of preferences may be required, a statute which requires preferences without providing for their expression is clearly distinguishable from those involved in the cited cases.

In these respects, in the imposition of additional burdens upon some voters and not on others, the issues in this case are not unlike those raised in *Harman* v. *Forssenius*, No. 360, October Term, 1964, in which probable jurisdiction was noted October 5, 1964.

Nothing short of granting this petition stands between the imposition of the burdens described above in greatly magnified form throughout the state upon all voters other than the completely faithful party member. The statute would not be any more uncon-sti-

tutional were every voter required to vote for all 124 of the State's Representative under these conditions, but for many the burden of voting would be so great that a strong compulsion would arise not to vote for State Representatives at all, The imposition of the burdens of compulsory voting may result not in greater voting participation but in decreased participation induced by despair of casting an effective ballot.

The nature and cumulative effect of the difference in burdens imposed upon some and not upon others as related at length illustrates that hostility and oppressiveness of purpose in the legislation which is forbidden by the equal protection clause. *Kotch* v. *Pilot Comm'rs*, 330 U.S. 552, 556 (1947); *Cf. Perez* v. *Sharp*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

Because until most recently, the Democratic primary has been the only meaningful election in South Carolina, it is unlikely that the hostility and oppressiveness of purpose evidenced by the statute was directed at the Republican party. It is, however, common knowledge that Southern States have from time to time enacted legislation upon the political process which typically evinced hostility and oppressive purpose toward Negro participation in the process. There can be little doubt that Negroes are protected by the First and Fourteenth Amendments from such hostility and oppressive purpose, as well as by the Fifteenth. Surely appellants and others similarly situated can claim like protection. The view of Justice Miller in the *Slaughterhouse Cases* that the protection of the Fourteenth Amendment extended only to Negroes has long since been abandoned by the Court. The general applicability of the Amend-

ment was specifically recognized in *U. S.* v. *Mosley*, 238 U.S. 383 (1915), involving facts which accomplished with glaring cruelty the results which § 23-357 is designed to accomplish *suaviter*.

It should be emphasized that the elimination of the words "or less" would give no party and no voter an advantage over the other, which the District Court failed to appreciate in evolving its remarkable theory that the purpose of the statute is to *avoid* dilution of voting weight. Without the words "or less" in the statute, liberty of electoral choice would be preserved and equality of electoral choice restored. The assumption that one party would be aided in preference to the other is gratuitous, but more to the point is irrelevant. If parties are to be meaningful parts of the political process, what benefits the voter's rights benefits all parties equally, although certain party functionaries may be disadvantaged. In short, elimination of the words "or less" would place all voters, Democrat, Republican, independent, or confused in the same position and would eliminate a major source of confusion of the voter. In Richland County, each voter would be *equally free* to allocate his ten votes as he wished or not to use them or a part of them. Each voter would be *equally free* to choose to vote for any number between one and ten, from among the party nominees, or independent candidates, or write-in designees in any combination. This very concept of equality of choice is the fundamental question in *Fortson* and *Scranton*, and furnishes another linkage between these cases and *Boineau*.

CONCLUSION

For the above reasons, appellants respectfully pray that the order affirming the decision below be withdrawn and that alternatively the decision of the Court below be summarily reversed or the cause set for argument on the merits.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

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